

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION II

-----X  
In the Matter of: )  
Hertel Landfill Superfund Site )  
Hamlet of Clintondale, Town of )  
Plattekill, Ulster County, New York )

Alfa Laval Inc. )  
f.k.a. Alfa-Laval, Inc. )  
f.k.a. DeLaval Separator Company )  
Berncolors-Poughkeepsie, Inc. )  
City of Poughkeepsie, New York )  
Frye Copysystems, Inc. )  
International Business Machines )  
Corporation )  
Kem Plastic Playing Cards, Inc. )  
Poughkeepsie Newspaper Division of )  
Gannett Satellite Information )  
Network, Inc. )  
f.k.a./a.k.a. Poughkeepsie Journal )  
tesa tape inc. )  
f.k.a. tesa tuck inc. )  
f.k.a. Tuck Industries, Inc. )

Respondents. )

Proceeding Under Section 106(a) of the )  
Comprehensive Environmental Response, )  
Compensation, and Liability Act of )  
1980, as amended, 42 U.S.C. § 9606(a). )  
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ADMINISTRATIVE ORDER  
FOR REMEDIAL DESIGN  
AND REMEDIAL ACTION

Index Number  
II-CERCLA-97-0207

ADMINISTRATIVE ORDER  
FOR REMEDIAL DESIGN AND REMEDIAL ACTION

366538



HERTEL LANDFILL SUPERFUND SITE

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ADMINISTRATIVE ORDER  
FOR REMEDIAL DESIGN AND REMEDIAL ACTION

I. INTRODUCTION AND JURISDICTION

1. This Order directs Alfa Laval Inc., f.k.a. Alfa-Laval, Inc., and f.k.a. DeLaval Separator Company; Berncolors-Poughkeepsie, Inc.; City of Poughkeepsie, New York; Frye Copysystems, Inc.; International Business Machines Corporation; Kem Plastic Playing Cards, Inc.; Poughkeepsie Newspaper Division of Gannett Satellite Information Network, Inc.; tesa tape inc., f.k.a. tesa tuck inc., and f.k.a. Tuck Industries, Inc. (the "Respondents") to perform the remedial design for the remedy described in the Record of Decision dated September 27, 1991, and to implement the design by performing the remedial action for the Hertel Landfill Superfund Site located in the Hamlet of Clintondale, Town of Plattekill, Ulster County, New York.

2. This Order is issued to Respondents by the United States Environmental Protection Agency ("EPA") pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a). This authority was delegated to the Administrator of EPA by Executive Order No. 12580, 52 Fed. Reg. 2923 (January 23, 1987), and was further delegated to EPA Regional Administrators on September 13, 1987 by EPA Delegation No. 14-14-B.

II. NOTICE TO THE STATE

3. Notice of this Order has been given to the New York State Department of Environmental Conservation in accordance with Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

III. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or its implementing regulations. Whenever terms listed below are used in this Order and in attachments to, or documents incorporated by reference into, this Order, the following definitions shall apply:

a. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9601 et seq.

b. "Day" or "working day" means a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal Holiday, the period shall run until the close of business on the next working day.

c. "EPA" means the United States Environmental Protection Agency and any successor departments or agencies of the United States.

d. "Hazardous substance" shall have the meaning provided in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

e. "National Contingency Plan" or "NCP" means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated under Section 105 of CERCLA, 42 U.S.C. § 9605, published at 55 Fed. Reg. 8666 (1990), and codified at 40 C.F.R. Part 300, including any amendments thereto.

f. "NYSDEC" means the New York State Department of Environmental Conservation.

g. "Operation and Maintenance" or "O&M" means those activities required under this Order for the purpose of maintaining the effectiveness of the measures taken in the Remedial Action (as defined below) following the implementation of those measures.

h. "Parties" means the United States of America and/or Respondents.

i. "Performing Parties" means those parties or individuals who are performing the Remedial Design and Remedial Action for the Site pursuant to any other order or agreement.

j. "Performance Standards" means those cleanup standards, standards of control, and other substantive requirements, criteria or limitations set forth in or referenced in the ROD or which are otherwise approved by EPA in writing during the course of the Work. Requirements promulgated or modified after the issuance of the Record of Decision may become Performance Standards pursuant to Part 300.430(f)(1)(ii)(B) of the NCP.

k. "Record of Decision" or "ROD" means the Record of Decision document issued by EPA on September 27, 1991 (and all attachments thereto) in which the remedy at the Site was selected by the Regional Administrator of EPA, Region II. The ROD is attached to this Order as Appendix I, and is incorporated herein by reference.

l. "Remedial Action" or "RA" means the remedy authorized by the ROD, as further delineated in this Order, and in the various EPA-approved plans referred to below.

m. "Remedial Design" or "RD" means those activities to be undertaken by Respondents to develop the final "RD Report" including, but not limited to, the final plans and

specifications and other components and requirements for the RA pursuant to the EPA-approved plans referred to below.

n. "Respondents" means Alfa Laval Inc., f.k.a. Alfa-Laval, Inc., and f.k.a. DeLaval Separator Company ("Alfa Laval"); Berncolors-Poughkeepsie, Inc. ("Berncolors"); City of Poughkeepsie, New York ("City of Poughkeepsie"); Frye Copysystems, Inc. ("Frye"); International Business Machines Corporation ("IBM"); Kem Plastic Playing Cards, Inc. ("Kem"); Poughkeepsie Newspaper Division of Gannett Satellite Information Network, Inc., f.k.a./a.k.a. Poughkeepsie Journal ("Poughkeepsie Journal"); tesa tape inc., f.k.a. tesa tuck inc., and f.k.a. Tuck Industries, Inc. ("Tesa Tape").

o. "Site" means the Hertel Landfill Site located in the Hamlet of Clintondale, Town of Plattekill, Ulster County, New York.

p. "State" means the State of New York.

q. "Waste Material" means:

- i. any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14);
- ii. any "pollutant or contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33);
- iii. any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and
- iv. any mixture containing any of the constituents noted in i., ii., or iii., above.

r. "Work" means all work and other activities required by and pursuant to this Order, including, but not limited to, implementation and Operation and Maintenance of the Remedial Action, and the preparation of the schedules, plans, and reports required hereunder to be submitted in connection therewith.

#### IV. FINDINGS OF FACT

5. The Site, which includes an approximately 15.5-acre landfill located on an approximately 76-acre tract, is located in the Hamlet of Clintondale, Town of Plattekill, Ulster County, New York, just off U.S. Route 44/NY Route 55 ("Route 44/55") approximately midway between Bedell Avenue and Tuckers Corner Road.

6. There are no buildings at the Site. Private residences are located north of the Site on Route 44/55 (approximately 1200 feet from the landfill), and also east of the Site on Tuckers Corner Road (approximately 3000 feet from the landfill).

7. The topography of the 76-acre tract is generally flat with a gentle overall slope descending to the east. The landfill is located approximately at the center of the tract and is covered with rocky soil, vegetation including patches of grass and small shrubs, and wastes.

8. Wetlands border the Site to the north, south, and east. Wetlands cover approximately 13 percent of the 76-acre tract. A small unnamed stream crosses the southern and eastern area of the tract and flows in a northeasterly direction, bordering the east side of the landfill.

9. Two aquifers exist beneath the Site. The bedrock material is part of the Austin Glen formation, which consists of greywacke and shale. The rock has well defined bedding planes and the upper few feet are slightly weathered. The overburden is a glacial till deposit consisting of an unsorted mixture of material (clay, silt, sand, gravel, and boulders) which widely range in size, shape, and permeability. Overlying the till deposit is a layer of light brown fine sand and silt.

10. The Hertel Landfill was used for the disposal of solid waste from 1963 until 1977. Carlo Hertel, doing business as Toby & Son Sanitation and subsequently as Hertel Enterprises, Inc., operated a privately-owned landfill at the Site from at least as early as 1963 until 1975. Carlo and Angela Hertel owned the property on which the Site is located from 1965 until June 1975. On June 30, 1975, Dutchess Sanitation Services, Inc. ("DSS") purchased the property on which the Site is located and continued operating a privately-owned landfill at the Site. DSS had previously transported wastes to the Site for disposal since approximately 1969. In 1977, the New York State Supreme Court, Ulster County, enjoined DSS from disposing of refuse at the Site in violation of a Town of Plattekill ordinance prohibiting the disposal of waste, which was generated outside the Town, within the Town's boundaries.

11. On June 2, 1980, DSS dissolved and its stockholders formed a partnership known as F.I.C.A. ("FICA"). On June 3, 1980, as a result of mortgage foreclosure proceedings, the property on which the Site is located was transferred from FICA back to Angela Hertel, whose husband was then deceased. On March 2, 1981, Ms. Hertel conveyed the property on which the Site is located to Hudson Valley Environmental Services, Inc. ("HVES"), which is the property's current record owner.

12. In June 1986, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List ("NPL"), set forth at 40 C.F.R. Part 300, Appendix B.

13. On October 15, 1986, the State of New York State filed an action in the U.S. District Court for Northern District of New

York under CERCLA against Joseph Fiorillo, Sr. (a partner in FICA and a shareholder and officer of DSS), FICA, and HVES. The action sought cleanup of the Site, compensation for natural resource damages, abatement of public nuisance, and recovery of response costs incurred at the Site. On May 8, 1991, the parties to the State litigation stipulated to remove the lawsuit from the Court's active docket pending the filing of a lawsuit by EPA to recover its response costs at the Site.

14. In August 1988, EPA assumed the lead for remediating the Site and notified HVES' apparent owner and operator, Paul Winters, that he was a potentially responsible party ("PRP") at the Site. EPA subsequently entered into negotiations with Winters to conduct the Remedial Investigation/Feasibility Study ("RI/FS") at the Site. In April 1989, however, EPA determined that it would conduct the RI/FS at the Site because of uncertainty over HVES'/Winter's ability to undertake the work.

15. Surface soil sampling at the Site, which is summarized in Section 6.3.3 of the Remedial Investigation Report (July 1991) ("RI Report"), detected semivolatile organics, inorganics, and pesticides.

- a. Semivolatiles detected in the surface soil include bis(2-ethylhexyl)phthalate and polynuclear aromatic hydrocarbons such as benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)perylene, chrysene, fluoranthene, indeno(1,2,3 cd)pyrene, phenanthrene, and pyrene.
- b. Inorganics detected in the surface soil at elevated concentrations include arsenic, cadmium, chromium, cobalt, copper, iron, lead, magnesium, manganese, mercury, nickel, and zinc.
- c. Pesticides detected in the surface soil include 4,4'-DDE and 4,4'-DDT.

16. Subsurface soil sampling at the Site, which is summarized in Section 6.3.4 of the RI Report, detected semivolatile organics, volatile organics, and inorganics.

- a. Semivolatiles detected in the subsurface soil include bis(2-ethylhexyl)phthalate, fluoranthene, naphthalene, and pyrene.
- b. Volatile organics detected in the subsurface soil include ethylbenzene, toluene, xylene, and benzene.
- c. Inorganics detected in the subsurface soil at elevated concentrations include antimony, barium, cadmium, cobalt, copper, lead, manganese, nickel, and zinc.

17. Surface water sampling at the Site, which is summarized in Section 6.3.5 of the RI Report, detected semivolatile organics, volatile organics, and inorganics.

- a. Semivolatiles detected in the surface water include 4-methylphenol, bis(2-ethylhexyl)phthalate, and phenanthrene.

b. Volatile organics detected in the surface water include carbon disulfide, chlorobenzene, ethylbenzene, toluene, and xylene.

c. Inorganics detected in the surface water at elevated concentrations include aluminum, arsenic, barium, calcium, cadmium, chromium, cobalt, copper, iron, lead, magnesium, manganese, mercury, nickel, potassium, sodium, zinc, and cyanide.

18. Sediment sampling at the Site, which is summarized in Section 6.3.6 of the RI Report, detected semivolatile organics, volatile organics, inorganics, and pesticides.

a. Semivolatiles detected in the sediment samples include bis(2-ethylhexyl)phthalate, chrysene, di-n-butyl phthalate, fluoranthene, fluorene, naphthalene, phenanthrene, and pyrene.

b. Volatile organics detected in the sediment samples include chlorobenzene and xylene.

c. Inorganics detected in the sediment samples at elevated concentrations include arsenic, cadmium, chromium, cobalt, copper, iron, lead, manganese, nickel, and zinc.

d. Pesticides detected in the sediment samples include 4,4'-DDE and 4,4'-DDT.

19. Groundwater sampling at the Site, which is summarized in Section 6.3.6 of the RI Report, detected semivolatile organics, volatile organics, and inorganics.

a. Semivolatiles detected in the groundwater include 4-methylphenol, diethyl phthalate, 2,4-dimethylphenol, benzoic acid, naphthalene, and phenol.

b. Volatile organics detected in the groundwater include chlorobenzene, ethylbenzene, toluene, and xylene.

c. Inorganics detected in the surface water include aluminum, antimony, arsenic, barium, calcium, cadmium, cobalt, iron, lead, magnesium, manganese, nickel, potassium, sodium, and zinc.

20. The investigations at the Site showed the presence of maximum concentrations of, inter alia, bis(2-ethylhexyl) phthalate (4500 ppb in subsurface soil), diethyl phthalate (900 ppb in groundwater), and cadmium (178 ppb in a leachate seep; 37 ppb in surface water; 17,700 ppb in sediments; 9 ppb in groundwater).

21. EPA completed the RI/FS in July 1991 and issued a proposed plan for the Site on July 26, 1991. EPA issued a ROD selecting a remedy for the Site on September 27, 1991. The remedy, which has an estimated present worth cost of \$8.2 million, involves the construction of a multi-layer cap over the landfill portion of the Site, installation of gas vents in the landfill, mitigation of potential harmful impacts to the wetlands adjacent to the Site, and implementation of a comprehensive groundwater monitoring program for the Site. The ROD also calls for pumping



and treating the groundwater at the Site using membrane microfiltration to remove metals and ultraviolet light and hydrogen peroxide oxidation to remove organics.

22. EPA determined in the ROD that, if left unremediated, the Site would pose current health risks to area residents as a result of potential exposure to contaminants through dermal contact with soils and surface water at the Site. EPA also determined in the ROD that, if left unremediated, the Site would pose future health risks to area residents as a result of potential exposure to contaminants through the ingestion of drinking water and soils, as well as dermal contact with soils, at the Site.

23. The State of New York concurred on the remedy selected in the ROD. The ROD is supported by an administrative record that contains the documents and information upon which EPA based the selection of the response action.

24. On August 14, 1991, EPA notified 16 parties of their PRP status under CERCLA and also sent information request letters to the PRPs and to 20 other entities.

25. On May 6, 1992, EPA sent special notice letters to HVES, FICA, Joseph Fiorillo, Sr. ("Fiorillo"), Ford Motor Company ("Ford"), I.S.A. in New Jersey, Inc. ("ISA"), and Western Publishing Company, Inc. ("Western," now currently known as Golden Books Publishing Co., Inc.) inviting them to consent to undertake the RD/RA at the Site and also demanding reimbursement of EPA's response costs that were then approximately \$1,830,000. The statutory period for submission of a good faith offer (which had been extended to June 30, 1992) expired without EPA receiving any such offers.

26. EPA issued Administrative Order No. II CERCLA-20217 to HVES, FICA, Fiorillo, Ford, ISA, and Western on September 21, 1992 ("1992 UAO"), to perform the RD/RA for the remedy described in the ROD. Ford was the only recipient to comply with 1992 UAO, which became effective on November 3, 1992, until Western began its compliance with the Order on September 25, 1996, prior to entering into an agreement with EPA to pay a penalty in settlement of the government's claim against it for civil penalties and punitive damages for noncompliance with the 1992 UAO.

27. Based on analysis of groundwater data obtained at the Site by Ford in performance of the RD, EPA has determined that a reevaluation of the groundwater treatment portion of the remedy called for in the ROD may be appropriate. EPA directed Ford on April 9, 1996 to defer RD work on groundwater remediation at the Site pending collection and analysis of additional groundwater data at and around the Site (see Appendix III for April 9, 1996 correspondence and other EPA documents regarding modifications to

the RD requirements). On September 30, 1996, EPA approved the RD for the landfill cap as submitted by Ford (attached hereto as Appendix IV). Construction of the landfill cap at the Site is scheduled to begin on March 15, 1997.

28. In April and May, 1996, each of the Respondents was notified of its potential liability at the Site and offered the opportunity to consensually perform the RD/RA.

29. EPA has afforded the Parallel UAO Respondents several opportunities to settle their potential liability at the Site, including opportunities to participate on consent with the 1992 UAO Respondents in performance of the RD/RA for the Site. The eight Parallel UAO Respondents have each rejected the settlement offers made by the government.

30. Actual or threatened releases of hazardous substances from the Site, if not addressed by implementing the response actions selected in the ROD, may present an imminent and substantial endangerment to the public health or welfare, or the environment.

#### V. CONCLUSIONS OF LAW

31. The Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

32. Respondents are "persons" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Respondents are liable parties as defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are subject to this Order under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

33. Alfa Laval Inc., f.k.a. Alfa-Laval, Inc., and f.k.a. DeLaval Separator Company arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

34. Berncolors-Poughkeepsie, Inc. arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

35. City of Poughkeepsie, New York arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), and/or accepted hazardous substances for transport for disposal to the Site within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).

36. Frye Copysystems, Inc. arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

37. International Business Machines Corporation arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

38. Kem Plastic Playing Cards, Inc. arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

39. Poughkeepsie Newspaper Division of Gannett Satellite Information Network, Inc., f.k.a./a.k.a. Poughkeepsie Journal arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

40. tesa tape inc., f.k.a. tesa tuck inc., and f.k.a. Tuck Industries, Inc. arranged for the disposal, or arranged with a transporter for transport for disposal, of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

41. The substances listed in paragraphs 15 through 19 are found at the Site and they include "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14). These hazardous substances have been released at and from the Site into the environment.

42. The past disposal and subsequent migration of hazardous substances at and from the Site are a "release" as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

43. The actions required by this Order are necessary to protect the public health, welfare, and the environment.

## VI. DETERMINATION

44. Based on the FINDINGS OF FACT and CONCLUSIONS OF LAW set forth above and the entirety of the administrative record, the Regional Administrator has determined that the release or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment.

## VII. ORDER

45. Based on the foregoing, Respondents are hereby ordered, jointly and severally, to comply with the following provisions, all documents incorporated by reference into this Order, and all schedules and deadlines in this Order, attached to this Order, or incorporated by reference into this Order.

## VIII. PARTIES BOUND

46. This Order shall apply to and be binding upon Respondents and their directors, officers, employees, agents, successors, and assigns. Respondents are jointly and severally responsible for carrying out all activities required by this Order. No change in the ownership, corporate status, or other control of Respondents shall alter any of the Respondents' responsibilities under this Order.

47. Respondents shall provide a copy of this Order to any prospective owners or successors before a controlling interest in Respondents' assets, property rights, or stock are transferred to the prospective owner or successor. Respondents shall provide a copy of this Order to each contractor, subcontractor, laboratory, or consultant retained to perform any Work under this Order, within five (5) days after the effective date of this Order or on the date such services are retained, whichever date occurs later. Respondents shall also provide a copy of this Order to each person representing Respondents with respect to the Site or the Work and shall condition all contracts and subcontracts entered into hereunder upon performance of the Work in conformity with the terms and conditions of this Order. With respect to the activities undertaken pursuant to this Order, each contractor and subcontractor shall be deemed to be related by contract to the Respondents within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Notwithstanding the terms of any contract, Respondents are responsible to the United States for compliance with this Order and for ensuring that their contractors, subcontractors, and agents comply with this Order, and perform any Work in accordance with this Order.

## XI. NOTICE OF INTENT TO COMPLY

48. Each Respondent shall provide, not later than seven (7) days after the effective date of this Order, written notice to EPA's Remedial Project Manager ("RPM") at the address given in Paragraph 82 stating whether it will comply with the terms of this Order. A statement of intent to comply must specify a Respondent's proposed manner of compliance with the Order. If a Respondent does not unequivocally commit to perform the Work as provided by this Order, it shall be deemed to have violated this Order and to have failed or refused to comply with this Order. If relevant, a Respondent's written notice shall describe, using

facts that exist on or prior to the effective date of this Order, any "sufficient cause" defenses asserted by such Respondent under Sections 106(b) and 107(c)(3) of CERCLA. The absence of a response by EPA to the notice required by this paragraph shall not be deemed to be an acceptance of a Respondent's assertions.

#### X. WORK TO BE PERFORMED

##### 49. Performance of Work/Coordination and Participation

a. Respondents shall perform the Work in accordance with this Order, and shall comply with all other requirements of this Order.

b. To the extent the Performing Parties are performing or are obligated to perform the Work as identified in Subparagraph a. of this Paragraph 49, pursuant to any other order or agreement, each Respondent shall make best efforts to coordinate with the Performing Parties. Best efforts to coordinate shall include, at a minimum:

i. communication in writing within seven (7) days of the effective date of this Order to the Performing Parties with a copy to EPA at the addresses provided in Paragraphs 82 and 84, respectively, as to Respondent's intent to comply with this Order and to participate in the performance of the Work or, in lieu of performance, to pay for the performance of the Work in whole or in part; and

ii. submission within fourteen (14) days of the effective date of this Order of a good-faith offer to the Performing Parties to participate in the performance of the Work, in whole or in part, or in lieu of participating in the performance of the Work, to pay for the Work, in whole or in part; and

iii. engaging in good-faith negotiations with the Performing Parties to perform or, in lieu of performance, to pay for the Work required by this Order if Performing Parties refuse Respondent's first offer.

c. To the extent Performing Parties are performing or are obligated to perform the Work as identified in Subparagraph a. of this Paragraph 49, pursuant to any other order or agreement, each Respondent shall make best efforts to participate in the performance of the Work with the Performing Parties. Best efforts to participate shall include, in addition to the requirements set out in Subparagraph b. of this Paragraph 49, at a minimum:

i. performance of the Work as agreed by Respondent and the Performing Parties to be undertaken by Respondent; and

ii. payment of all amounts as agreed by Respondent and the Performing Parties to be paid by Respondent if, in lieu of performance, Respondent has offered to pay for the Work required by this Order, in whole or in part.

d. Each Respondent shall notify EPA in writing within seven (7) days of the rejection, if any, by the Performing Parties of Respondent's offer to coordinate and participate in performance of, or, in lieu of performance, to pay for the Work.

e. The undertaking or completion of any requirement of this Order by any other person, with or without the participation of any Respondent, shall not relieve a Respondent of its obligations to perform each and every other requirement of this Order.

f. Any failure to perform, in whole or in part, any requirement of this Order by any other person with whom a Respondent is coordinating or participating in the performance of such requirement shall not relieve a Respondent of its obligation to perform each and every requirement of this Order.

50. Performance of Work/General Requirements

a. Respondents shall give EPA fourteen (14) days advance notice of all field activities to be performed pursuant to this Order.

b. All of the Work to be performed by Respondents pursuant to this Order shall be under the direction and supervision of a qualified professional engineer licensed in the State of New York (hereinafter, the "Supervising Contractor") the selection of which shall be subject to approval by EPA. At least fifteen (15) days prior to the initiation of the Work, Respondents shall notify EPA, in writing, of the name, title, and qualifications, of the Supervising Contractor proposed to be used in carrying out the Work. If at any time Respondents propose to change their Supervising Contractor, Respondents shall notify EPA, in writing as above, and shall obtain approval from EPA before the new Supervising Contractor performs, directs or supervises any work under this Order.

c. EPA will notify Respondents in writing of its approval or disapproval of a proposed Supervising Contractor. If EPA disapproves of the selection of any contractor as Supervising Contractor, Respondents shall submit to EPA within thirty (30) days of receipt of EPA's disapproval of the contractor previously selected, a list of contractors, including the qualifications of each contractor, that would be acceptable to Respondents. EPA will provide written

notice to Respondents of the names of the contractor(s) that are acceptable to EPA. Respondents may select any approved contractor from that list and shall notify EPA of the name of the contractor selected within twenty-one (21) days of EPA's designation of approved contractors.

d. The work to be performed by Respondents pursuant to this Order shall, at a minimum, achieve the requirements of the ROD (including, but not limited to the Performance Standards) and be performed in a manner consistent with the ROD. Nothing in this Order or the plans or other documents required to be submitted pursuant to this Order, or EPA's approval of those plans or other documents, constitutes a warranty or representation of any kind by EPA that compliance with those plans and this Order will achieve the requirements of the ROD, and such compliance shall not foreclose EPA from seeking performance of additional work to achieve the requirements of the ROD (attached hereto as Appendix I) and the Performance Standards in the Statement of Work ("SOW") (attached hereto as Appendix II).

e. As described in greater detail below in this Section and in the Appendices hereto, the Work shall include at a minimum, subject to performance prior to the effective date of this Order of portions of the Work by the Performing Parties, and subject to modifications of the SOW made by EPA:

- i. Design, construction, and operation and maintenance of a multi-layer cap consistent with New York State closure requirements (6 NYCRR Part 360) including any necessary design and field studies;
- ii. Installation of gas vents in the landfill;
- iii. Conducting a comprehensive groundwater monitoring program using existing monitoring wells and a minimum of six additional monitoring wells;
- iv. Construction of a fence surrounding the perimeter of the 13-acre landfill;
- v. Groundwater extraction and treatment consisting of membrane microfiltration and ultraviolet/hydrogen peroxide oxidation of organics; and
- vi. Measures to mitigate potential impacts on adjacent wetlands.

#### 51. Performance of Work/Remedial Design

a. As required in accordance with Appendices II, III, and IV, Respondents shall submit a work plan for the Remedial Design at the Site ("Remedial Design Work Plan" or "RD Work Plan") to EPA and the State for review and approval. The RD Work Plan shall provide for design of the remedy set forth in the ROD in accordance with the SOW and, upon its approval by EPA, shall be incorporated into this Order as a

requirement of this Order and shall be an enforceable part of this Order.

b. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of:

- i. design sampling and analysis plan including, but not limited to, a Quality Assurance/Quality Control ("QA/QC") Plan in accordance with Section XVII (Quality Assurance/Control, Sampling, and Data Analysis));
- ii. Treatability Study Work Plan;
- iii. pre-design work plan;
- iv. design criteria report;
- v. preliminary design report;
- vi. intermediate design report;
- vii. pre-final/final design report; and
- viii. Construction Quality Assurance Project Plan.

In addition, the Remedial Design Work Plan shall include a schedule for completion of the Remedial Action Work Plan.

c. Upon approval of the Remedial Design Work Plan by EPA, and submittal of the Health and Safety Plan for all field activities to EPA and the State, Respondents shall implement the RD Work Plan according to the schedule in the approved RD Work Plan. Any violation of the approved RD Workplan shall be a violation of this Order. Unless otherwise directed by EPA, Respondents shall not commence further Remedial Design activities at the Site prior to approval of the RD Work Plan.

- i. The design criteria report shall include, at a minimum, the following:
  - (1) design criteria;
  - (2) results of treatability studies;
  - (3) results of additional field sampling and pre-design work; and
  - (4) project delivery strategy;
- ii. The preliminary design report shall include, at a minimum, the following:
  - (1) preliminary plans, drawings and sketches;
  - (2) required specifications in outline form; and
  - (3) a preliminary construction schedule.
- iii. The intermediate design report, if required by EPA or if independently submitted by the Respondents, shall be a continuation and expansion of the preliminary design.
- iv. The pre-final/final design report shall include, at a minimum, the following:
  - (1) final plans and specifications;
  - (2) Operation and Maintenance Plan;
  - (3) Construction Quality Assurance Project Plan ("CQAPP");



- (4) Field Monitoring Plan (directed at measuring progress towards meeting Performance Standards); and
- (5) Contingency Plan.

The CQAPP, which shall detail the approach to quality assurance during construction activities at the site, shall specify a quality assurance official (QA Official), independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project.

52. Performance of Work/Remedial Action

a. Within sixty (60) days of Respondents' receipt of EPA's statement of approval of the RD Report, Respondents shall complete contractor procurement and initiate construction of the Remedial Action and shall thereafter perform and complete such construction in conformance with the EPA-approved RD Report, the schedule contained therein, and the requirements of this Order. Unless otherwise directed by EPA, Respondents shall not commence field activities until approval by EPA of the RD Report.

b. Respondents shall submit to EPA and NYSDEC a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for construction of the remedy, in accordance with the SOW, as set forth in the design plans and specifications in the approved final design report. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Order.

c. The Remedial Action Work Plan shall include the following:

- i. the schedule for completion of the Remedial Action;
- ii. schedule for developing and submitting other required Remedial Action plans;
- iii. methodology for implementation of the Construction Quality Assurance Plan;
- iv. methodology for implementation of the Operation and Maintenance Plan;
- v. methodology for implementation of the Contingency Plan;
- vi. the initial formulation of the Remedial Action Project Team (including, but not limited to, the Supervising Contractor);
- vii. construction quality control plan (by construction contractor); and
- viii. procedures and plans for the decontamination of equipment and the disposal of contaminated materials.

The Remedial Action Work Plan also shall include a schedule for implementation of all RA tasks identified in the final RD report.

d. Upon approval of the Remedial Action Work Plan by EPA, Respondents shall implement the activities required under the Remedial Action Work Plan. The Respondents shall submit to EPA and NYSDEC all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XV (EPA Review of Submissions). Unless otherwise directed by EPA, Respondents shall not commence physical on-site activities at the Site prior to approval of the Remedial Action Work Plan.

e. Pursuant to the schedule in the EPA-approved RD Report, Respondents shall complete construction. Within sixty (60) days of completion of construction, Respondents shall submit to EPA "as-built" engineering drawings which depict the closure cap and any other facilities constructed pursuant to this Order.

53. Performance of Work/Post Remedial Action

Within thirty (30) days after Respondents conclude that the Remedial Action has been fully performed, Respondents shall so notify EPA and shall schedule and conduct a pre-certification inspection to be attended by Respondents and EPA. The pre-certification inspection shall be followed by a written report submitted within thirty (30) days of the inspection by a registered professional engineer and Respondents' Project Coordinator certifying that the Remedial Action has been completed in full satisfaction of the requirements of this Order. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA determines that the Remedial Action or any portion thereof has not been completed in accordance with this Order, EPA shall notify Respondents in writing of the activities that must be undertaken to complete the Remedial Action and shall set forth in the notice a schedule for performance of such activities. Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established therein. If EPA concludes, following the initial or any subsequent certification of completion by Respondents that the Remedial Action has been fully performed in accordance with this Order, EPA may notify Respondents that the Remedial Action has been fully performed. EPA's notification shall be based on present knowledge and Respondents' certification to EPA, and shall not limit EPA's right to perform periodic reviews pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), or to take or require any action that in the judgment of EPA is appropriate at the Site, in accordance with Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, or 9607.

54. Performance of Work/Post Operation and Maintenance  
 Within thirty (30) days after Respondents conclude that all phases of the Work have been fully performed, that the Performance Standards have been attained, and that all Operation and Maintenance activities have been completed, Respondents shall submit to EPA a written report by a professional engineer registered in the State of New York certifying that the Work has been completed in full satisfaction of the requirements of this Order. EPA shall require such additional activities as may be necessary to complete the Work or EPA may, based upon present knowledge and Respondents' certification to EPA, issue written notification to Respondents that the Work has been completed, as appropriate, in accordance with the procedures set forth in the preceding paragraph for Respondents' certification of completion of the Remedial Action. EPA's notification shall not limit EPA's right to perform periodic reviews pursuant to Section 121(c) of CERCLA, 42 U.S.C. 9621(c), or to take or require any action that in the judgment of EPA is appropriate at the Site, in accordance with Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, or 9607.

#### XI. FAILURE TO ATTAIN PERFORMANCE STANDARDS

55. In the event that EPA determines that additional response activities are necessary to meet applicable Performance Standards, EPA may notify Respondents that additional response actions are necessary.

56. Unless otherwise stated by EPA, within thirty (30) days of receipt of notice from EPA that additional response activities are necessary to meet any applicable Performance Standards, Respondents shall submit for approval by EPA a work plan for the additional response activities. The plan shall conform to the applicable requirements of Sections X, XVII, and XVIII of this Order. Upon EPA's approval of the plan pursuant to Section XV, Respondents shall implement the plan for additional response activities in accordance with the provisions and schedule contained therein.

#### XII. EPA PERIODIC REVIEW

57. Under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations, EPA may review the Site to assure that the Work performed pursuant to this Order adequately protects human health and the environment. Until such time as EPA certifies completion of the Work, Respondents shall conduct the requisite studies, investigations, or other response actions as determined necessary by EPA in order to permit EPA to conduct the review under Section 121(c) of CERCLA. As a result of any review performed under this paragraph, Respondents may be required to perform additional Work or to modify Work previously performed.

## XIII. ADDITIONAL RESPONSE ACTIONS

58. EPA may determine that in addition to the Work identified in this Order and attachments to this Order, additional response activities may be necessary to protect human health and the environment. If EPA determines that additional response activities are necessary, EPA may require Respondents to submit a work plan for additional response activities. EPA may also require Respondents to modify any plan, design, or other deliverable required by this Order, including any approved modifications.

59. Not later than thirty (30) days after receiving EPA's notice that additional response activities are required pursuant to this Section, Respondents shall submit a work plan for the response activities to EPA for review and approval in accordance with Section XV below. Upon approval by EPA, the work plan will be incorporated into this Order as a requirement of this Order and shall be an enforceable part of this Order. Upon approval of the work plan by EPA, Respondents shall implement the work plan according to the standards, specifications, and schedule in the approved work plan. Respondents shall notify EPA of their intent to perform such additional response activities within seven (7) days after receipt of EPA's request for additional response activities.

## XIV. ENDANGERMENT AND EMERGENCY RESPONSE

60. In the event of any action or occurrence during the performance of the Work which causes or threatens to cause a release of a hazardous substance or which may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action to prevent, abate, or minimize the threat, and shall immediately notify the RPM or, if the RPM is unavailable, the Chief of the New York Remediation Branch of the Emergency and Remedial Response Division of EPA Region II. Respondents shall take such action in consultation with the RPM and in accordance with all applicable provisions of this Order, including but not limited to the Health and Safety Plan.

61. Nothing in the preceding paragraph shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Site.

## XV. EPA REVIEW OF SUBMISSIONS

62. After review of any deliverable, plan, report or other item which is required to be submitted for review and approval pursuant to this Order, EPA may:

- a. approve the submission;
- b. approve the submission with modifications;
- c. disapprove the submission and direct Respondents to re-submit the document after incorporating EPA's comments; or
- d. disapprove the submission and assume responsibility for performing all or any part of the response action. As used in this Order, the terms "approval by EPA," "EPA approval," or a similar term means the action described in a. or b. of this paragraph.

63. In the event of approval or approval with modifications by EPA, Respondents shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA.

64. Upon receipt of a notice of disapproval or a request for a modification, Respondents shall, within twenty-one (21) days or such other time as may be specified by EPA in its notice of disapproval or request for modification, correct the deficiencies and resubmit the plan, report, or other item for approval. Notwithstanding the notice of disapproval, or approval with modifications, Respondents shall proceed, at the direction of EPA, to take any action required by any nondeficient portion of the submission.

65. If upon the first resubmission or upon any subsequent resubmission, the plan, report, or other item is disapproved by EPA, Respondents shall be deemed to be out of compliance with this Order. In the event that a resubmitted plan, report, or other item, or portion thereof, is disapproved by EPA, EPA may again require that Respondents correct the deficiencies, in accordance with the preceding paragraphs of this Section. In addition, or in the alternative, EPA retains the right to amend or develop the plan, report or other item.

66. All plans, reports, and other submittals required to be submitted to EPA under this Order shall, upon approval by EPA, be deemed to be incorporated in and an enforceable part of this Order. In the event EPA approves a portion of a plan, report, or other item required to be submitted to EPA under this Order, the approved portion shall be deemed to be incorporated in and an enforceable part of this Order.

#### XVI. REPORTING REQUIREMENTS

67. In addition to any other requirement of this Order, Respondents shall prepare and provide to EPA written monthly progress reports which:

- a. describe the actions which have been taken toward achieving compliance with this Order during the previous month;

- b. include all results of sampling and tests and all other data received by Respondents during the previous month in the implementation of the Work;
- c. describe all actions, data and plans which are projected to be commenced or completed during the next month and provide other information relating to the progress of design and construction as is customary in the industry;
- d. include information regarding percentage of completion, all delays encountered or anticipated that may affect the future schedule for completion of the Remedial Action, and a description of all efforts made to mitigate those delays or anticipated delays.

These reports are to be submitted to EPA by the tenth day of every month following the effective date of this Order.

68. If the date for submission of any item or notification required by this Order falls upon a weekend or State or Federal holiday, the time period for submission of that item or notification is extended to the next working day following the weekend or holiday.

69. Upon the occurrence of any event during performance of the Work which, pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603 requires reporting to the National Response Center, Respondents shall, within twenty-four (24) hours, orally notify the EPA RPM, or, in the event of the unavailability of the EPA RPM, the Chief of the New York Remediation Branch of the Emergency and Remedial Response Division of EPA Region II, in addition to the reporting required by CERCLA Section 103. Within twenty (20) days of the onset of such an event, Respondents shall furnish EPA with a written report setting forth the events which occurred and the measures taken, and to be taken, in response thereto.

70. All reports and other documents submitted by Respondents to EPA (other than the monthly progress reports discussed above) which purport to document Respondents' compliance with the terms of this Order shall be signed by a responsible corporate official of one or more of the Respondents.

#### XVII. QUALITY ASSURANCE/CONTROL, SAMPLING, AND DATA ANALYSIS

71. Any QA/QC plan(s) submitted by Respondents pursuant to this Order shall be completed in accordance with the most updated versions of: EPA publication "Test Methods for Evaluating Solid Wastes" ("SW-846") (November 1986), the "Region II CERCLA Quality Assurance Manual" (October 1989), and the EPA documents entitled "Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans" (QAMS-005/80) and "Guidance for Preparation of Combined Work/Quality Assurance Project Plans for Environmental Monitoring" (USEPA, Office of Water Regulations and Standards, May 1984), or any revised versions thereof.

72. Respondents shall use QA/QC procedures in accordance with the QA/QC Plan(s) submitted and approved by EPA pursuant to this Order, and shall use standard EPA Chain of Custody procedures, as set forth in the National Enforcement Investigations Center Policies and Procedures Manual (November 1984), the National Enforcement Investigations Center Manual for the Evidence Audit (September 1981), and Section 1.3 of SW-846, or any amended versions thereof, while conducting all sample collection and analysis activities required pursuant to this Order. To provide quality assurance and maintain quality control, Respondents shall:

- a. Ensure that all contracts with laboratories used by Respondents for the analysis of samples taken pursuant to this Order provide for access of EPA personnel and EPA-authorized representatives to assure the accuracy of laboratory results related to the Site;
- b. Ensure that the laboratories utilized by Respondents for the analysis of samples taken pursuant to this Order perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" dated July 1988 and the "Contract Lab Program Statement of Work for Organic Analysis", dated February 1989, and any amendments made thereto during the course of the implementation of this Order;
- c. Ensure that all laboratories used by Respondents for analysis of samples taken pursuant to this Order participate in an EPA or EPA-equivalent QA/QC program;
- d. Ensure that the laboratories used by Respondents for the analysis of samples taken pursuant to this Order analyze samples that EPA may submit to those laboratories for purposes of insuring that the laboratories meet EPA-approved QA/QC requirements.

73. Respondents shall notify EPA not less than fourteen (14) days in advance of any sample collection activity. At the request of EPA, Respondents shall allow split or duplicate samples to be taken by EPA or its authorized representatives, of any samples collected by Respondents with regard to the Site or pursuant to the implementation of this Order. In addition, EPA shall have the right to take any additional samples that EPA deems necessary.

#### XVIII. COMPLIANCE WITH APPLICABLE LAWS

74. All activities by Respondents pursuant to this Order shall be performed in accordance with the requirements of all Federal and State laws and regulations. EPA has determined that the

activities contemplated by this Order are consistent with the National Contingency Plan.

75. Except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e) and the NCP, no permit shall be required for any portion of the Work conducted entirely on-Site. Where any portion of the Work requires a Federal or State permit or approval, Respondents shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

76. This Order is not, and shall not be construed to be, a permit issued pursuant to any Federal or State statute or regulation.

77. Waste Material Handling

a. All off-Site transfer, treatment, storage, or disposal of Waste Material by Respondents must be in compliance with the applicable requirements of the Resource Conservation and Recovery Act, ("RCRA") 42 U.S.C. § 6901, et seq.; Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3); the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq.; as well as their implementing regulations, and all other applicable laws, including, but not limited to, 40 C.F.R. Parts 262 and 263 and 6 NYCRR Part 372. Furthermore, Respondents shall provide notice to EPA of any facilities that Respondents propose to use for such off-Site transfer, storage, treatment, or disposal at least five (5) working days prior to the commencement of any such use, and shall obtain approval by EPA's RPM of the use of such facilities. Any and all off-Site disposal activities conducted by Respondents under this Order shall be performed in conformance with the NCP, and any amendments thereto, and Revised Procedures for Planning and Implementing Off-site Response Actions (U.S. EPA Office of Solid Waste and Emergency Response, November 13, 1987), and any amendments thereto.

b. If Waste Material from the Site is to be shipped to a waste management facility outside of New York State, Respondents shall provide prior written notification to the appropriate state environmental official in the receiving facility's state (with a copy to the EPA RPM) of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed ten (10) cubic yards. Respondents shall include in the written notification the following information: (i) the name and location of the facility to which the Waste Material is to be shipped; (ii) the type and quantity of the Waste Material to be shipped; (iii) the expected schedule for the shipment of the Waste Material; and (iv) the method of



transportation. Respondents shall provide such notification to the receiving facility's state and to EPA in writing as soon as practicable, but in any event at least ten (10) working days prior to the said shipments. Respondents shall notify the receiving facility's state of major changes in their shipment plan, such as a decision to ship the Waste Material to another facility within the same state.

#### XIX. REMEDIAL PROJECT MANAGER AND PROJECT COORDINATOR

78. EPA has designated the following individual as its Remedial Project Manager ("RPM") for the Site:

Sharon Trocher  
New York Remediation Branch  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency  
Region II  
290 Broadway, 20th Floor  
New York, NY 10007-1866  
(212) 637-3965

79. EPA has the unreviewable right to change its RPM. If EPA changes its RPM, EPA will inform Respondents in writing of the name, address, and telephone number of the new RPM.

80. The RPM shall have the authority lawfully vested in a RPM and On-Scene Coordinator by the NCP. The RPM shall have authority, consistent with the NCP, to halt any work required by this Order and to take any necessary response action.

81. Within seven (7) days after the effective date of this Order, Respondents shall designate a Project Coordinator and shall submit the name, address, telephone number, qualifications, and job title of the Project Coordinator to EPA for review and approval. Respondents' Project Coordinator shall be responsible for overseeing Respondents' implementation of this Order. If Respondents wish to change their Project Coordinator, Respondents shall provide written notice to EPA five (5) days prior to changing the Project Coordinator, identifying the name and qualifications of the new Project Coordinator. Respondents' selection of a Project Coordinator shall be subject to EPA approval.

#### XX. NOTIFICATION

82. All plans, reports, notices, and other documents required to be submitted to EPA under this Order shall be directed to the following individuals at the addresses specified below:

One (1) copy:

Chief, New York/Caribbean Superfund Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region II

290 Broadway, 17th Floor  
New York, NY 10007-1866  
Attention: Carl P. Garvey, Hertel Landfill Site  
Attorney

Two (2) copies (or ten (10) copies if such communication is a plan or report):

Chief, New York Remediation Branch  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency, Region II  
290 Broadway, 20th Floor  
New York, NY 10007-1866  
Attention: Sharon Trocher, Hertel Landfill Site  
Remedial Project Manager

83. In addition, when submitting to EPA any written communication required hereunder, Respondents shall simultaneously submit two (2) copies of that communication (unless the given document is a plan or report, in which case seven (7) copies shall be submitted) to:

Director, Division of Hazardous Waste Remediation  
New York State Department of Environmental  
Conservation  
50 Wolf Road  
Albany, NY 12233-7010  
Attention: Hertel Landfill Site Project Manager

84. Communication to the Performing Parties as required for purposes of Subparagraphs b. and c. of Paragraph 49 of this Order shall be sent, with a copy to EPA at the EPA addresses specified in Paragraph 82, to:

Peter L. Winick, Esq.  
Latham & Watkins  
1001 Pennsylvania Avenue, NW  
Suite 1300  
Washington, DC 20004-2505

Steven M. Oster, Esq.  
Willkie Farr & Gallagher  
Three Lafayette Center  
1155 21st Street, NW  
Suite 600  
Washington, DC 20036-3384

#### XXI. COMMUNITY RELATIONS

85. Respondents shall cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Respondents shall participate in the preparation of such information for distribution to the public and in public meetings

which may be held or sponsored by EPA to explain activities at or relating to the Site.

## XXII. SITE ACCESS

86. Respondents shall allow EPA and its authorized representatives, including contractors and subcontractors, to enter and freely move about all property at the Site for purposes of monitoring the progress of activities taking place, verifying any data or information submitted to EPA, conducting investigations relating to contamination or conditions at the Site, obtaining samples at the Site, inspecting and copying records, operating logs, contracts, or other documents required to assess Respondents' compliance with the Order, or for any other purpose reasonably related to EPA's oversight of the implementation of this Order. Respondents shall allow EPA and its authorized representatives to enter the Site, to inspect and copy all records, files, photographs, documents, sampling, and monitoring data, and other writings related to work undertaken in carrying out this Order. Nothing herein shall be interpreted as limiting or affecting EPA's right of entry or inspection authority under Federal law.

87. To the extent that any area where Work is to be performed hereunder is presently owned by parties other than Respondents, Respondents shall use their best efforts to obtain access agreements from the present owners within twenty-one (21) days of the effective date of this Order for purposes of implementing the requirements of this Order. Such agreements shall provide access not only for Respondents, but also for EPA and its authorized representatives or agents, as well as NYSDEC and its authorized representatives or agents. Such agreements shall specify that Respondents are not EPA's representatives with respect to liability associated with Site activities. If such access agreements are not obtained by Respondents within the time period specified herein, Respondents shall immediately notify EPA of their failure to obtain access, and shall include in that notification a summary of the steps Respondents have taken to attempt to obtain access. Subject to the United States' non-reviewable discretion, EPA may use its legal authorities to obtain access for Respondents, may perform those response actions with EPA contractors at the property in question, or may terminate the Order if Respondents cannot obtain access agreements. If EPA performs those tasks or activities with contractors and does not terminate the Order, Respondents shall perform all other activities not requiring access to that property. Respondents shall integrate the results of any such tasks undertaken by EPA into their reports and deliverables.

## XXIII. DATA AND DOCUMENT AVAILABILITY

88. Respondents may assert a claim of business confidentiality covering part or all of the information submitted to EPA pursuant to the terms of this Order under 40 C.F.R. Part 2.203, provided such claim is not inconsistent with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), or other provisions of law. This claim shall be asserted in the manner described by 40 C.F.R. Part 2.203(b) and substantiated by Respondents at the time the claim is made. Information determined to be confidential by EPA will be given the protection specified in 40 C.F.R. Part 2. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA or the State without further notice to Respondents. Respondents shall not assert confidentiality claims with respect to any data related to Site conditions, sampling, or monitoring.

89. Respondents shall maintain for the period during which this Order is in effect an index of documents that Respondents claim contain confidential business information. The index shall contain, for each document, the date, author, addressee, and subject of the document. Upon written request from EPA, Respondents shall submit a copy of the index to EPA.

## XXIV. RECORD PRESERVATION

90. Respondents shall provide to EPA upon request, copies of all documents and information within their possession and/or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

91. Until ten (10) years after EPA provides notice pursuant to Paragraph 104, below, of the satisfactory completion of the Work, Respondents shall preserve and retain, and shall instruct their contractors, subcontractors, and anyone else acting on Respondents' behalf with respect to the Site to preserve and retain all records, documents, and information of whatever kind, nature, or description now in their possession or control or which come into their possession or control that relate in any manner to the Site or the Work conducted at the Site. At the conclusion of this document retention period, Respondents shall notify EPA at least ninety (90) days prior to the destruction of any such records, documents, or information, and upon request by

EPA, Respondents shall deliver all such records, documents, and information to EPA.

#### XXV. DELAY IN PERFORMANCE

92. Any delay in performance of this Order that, in EPA's judgment, is not properly justified by Respondents under the terms of this Section shall be considered a violation of this Order. Any delay in performance of this Order shall not affect Respondents' obligations to perform all obligations fully under the terms and conditions of this Order.

93. Respondents shall notify EPA of any delay or anticipated delay in performing any requirement of this Order. Such notification shall be made by telephone to EPA's RPM within forty-eight (48) hours after Respondents first knew or should have known that a delay might occur. Respondents shall adopt all reasonable measures to avoid or minimize any such delay. Within five (5) working days after notifying EPA by telephone, Respondents shall provide written notification fully describing the nature of the delay, any justification for the delay, any reason why Respondents should not be held strictly accountable for failing to comply with any relevant requirements of this Order, the measures planned and taken to minimize the delay, and a schedule for implementing the measures that have been or will be taken to mitigate the effect of the delay. Increased costs or expenses associated with implementation of the activities called for in this Order is not a justification for any delay in performance.

#### XXVI. ASSURANCE OF ABILITY TO COMPLETE WORK

##### 94. Financial Assurance

a. Respondents shall demonstrate their ability to complete the Work required by this Order and to pay all claims that arise from the performance of the Work by obtaining and presenting to EPA within thirty (30) days of the effective date of this Order, one of the following;

- i. performance bond;
- ii. letter of credit;
- iii. guarantee by a third party; or
- iv. internal financial information to allow EPA to determine that Respondents have sufficient assets available to perform the Work.

b. Respondents shall demonstrate financial assurance in an amount no less than the estimate of cost for the RD/RA contained in the ROD for the Site. If Respondents seek to demonstrate ability to complete the RA by means of internal financial information, or by a guarantee of a third party, they shall resubmit such information annually, on the anniversary of the effective date of this Order. If EPA

determines that such financial information is inadequate, Respondents shall, within fourteen (14) days after receipt of EPA's notice of determination, obtain and present to EPA for approval one of the other three forms of financial assurance listed above.

95. At least seven (7) days prior to commencing any work at the Site pursuant to this Order, Respondents shall submit to EPA a certification that Respondents or their contractors and subcontractors have adequate insurance coverage or have indemnification for liabilities for injuries or damages to persons or property which may result from the activities to be conducted by or on behalf of Respondents pursuant to this Order. Respondents shall ensure that such insurance or indemnification is maintained for the duration of the Work required by this Order.

#### XXVII. UNITED STATES NOT LIABLE

96. The United States, by issuance of this Order, assumes no liability for any injuries or damages to persons or property resulting from acts or omissions by Respondents, or their directors, officers, employees, agents, representatives, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order. Neither EPA nor the United States may be deemed to be a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order.

#### XXVIII. ENFORCEMENT AND RESERVATIONS

97. Respondents shall be subject to civil penalties under Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), of not more than \$25,000 for each day in which Respondents willfully violate, or fail or refuse to comply with this Order without sufficient cause. Beginning on January 31, 1997, Respondents shall be subject to civil penalties under Section 106(b) of CERCLA, 42 U.S.C. § 9606(b) as amended by the Debt Collection and Improvement Act of 1996 (see Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (December 31, 1996)) of not more than \$27,500 for each day in which Respondents willfully violate, or fail or refuse to comply with this Order without sufficient cause. In addition, failure to properly carry out response actions under this Order, or any portion hereof, without sufficient cause, may result in liability under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), for punitive damages in an amount at least equal to, and not more than three (3) times the amount of any costs incurred by EPA as a result of such failure to take proper action.

98. EPA reserves the right to bring an action against Respondents under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any Response Costs incurred by the United States in connection with the Site. This reservation shall include but not be limited to past costs, future costs, direct costs, indirect costs, the costs of oversight, as well as accrued interest as provided in Section 107(a) of CERCLA.

99. Notwithstanding any other provision of this Order, at any time during the response action, EPA may perform its own studies, complete the response action (or any portion of the response action) as provided in CERCLA and the NCP, and seek reimbursement from Respondents for its costs, or seek any other appropriate relief.

100. Nothing in this Order shall preclude EPA from taking any additional enforcement actions, including modification of this Order, issuance of additional orders, and/or additional remedial or removal actions as EPA may deem necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA, or any other applicable law.

101. Notwithstanding any provision of this Order, the United States hereby retains all of its information gathering, inspection, and enforcement authorities and rights under CERCLA, RCRA, and any other applicable statutes or regulations.

102. Nothing in this Order shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person for any liability it may have arising out of or relating in any way to the Site.

#### XXIX. SEVERABILITY

103. If a court issues an order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, Respondents shall remain bound to comply with all provisions of this Order not invalidated by or not determined to be subject to a sufficient cause defense by the court's order.

#### XXX. TERMINATION AND SATISFACTION

104. This Order will be terminated by EPA if Respondents demonstrate in writing and certify to the satisfaction of EPA that all Work and activities required under this Order, including any additional work required by EPA, have been performed fully in accordance with this Order and EPA has approved the certification in writing. Such an approval by EPA, however, shall not relieve Respondents of any remaining obligations under the Order, including those requirements set forth in Section XXIV regarding record preservation. Respondents' written submission under this

paragraph shall include a sworn statement by a responsible corporate official(s) of one or more of the Respondents which states the following: "I certify that the information contained in or accompanying this submission is true, accurate, and complete."

#### XXXI. OPPORTUNITY TO CONFER

105. A Respondent may, within five (5) days after this Order has been signed by the Regional Administrator, request a conference with EPA to discuss the Order. All such conferences shall be held on one date set by EPA at its offices at 290 Broadway, New York, NY 10007-1866.

106. The purpose and scope of each conference shall be limited to issues involving the implementation of the Work required by this Order and the extent to which Respondents intend to comply with this Order. Such a conference is not an evidentiary hearing, and does not constitute a proceeding to challenge this Order. It does not give Respondents a right to seek review of this Order, or to seek resolution of potential liability. No official stenographic record of the conference will be made. At any conference held pursuant to a Respondent's request, the Respondent may appear in person or by an attorney or other representative.

107. Requests for a conference must be made by telephone to Carl P. Garvey Esq., Office of Regional Counsel, EPA Region II, telephone (212) 637-3181, followed by written confirmation mailed that day to Mr. Garvey at the address set forth in Paragraph 82 of this Order.

#### XXXII. EFFECTIVE DATE AND COMPUTATION OF TIME

108. This Order shall be effective against each Respondent seven (7) days after the Order is signed by the Regional Administrator, unless a conference or conferences are requested pursuant to the Section XXXI of this Order. If a timely request for a conference or conferences is made, this Order shall become effective three (3) days after such conference or conferences. All times for performance of ordered activities shall be calculated from this effective date.

So Ordered, this 10 day of February 1997.

BY:

  
 Jeanne M. Fox  
 Regional Administrator  
 U.S. Environmental Protection Agency